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Subject Index

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 168

MARVIN CLAUDE BELL,

Petitioner,

vs.

STATE OF NORTH CAROLINA

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

To the Honorables, Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner Marvin Claude Bell was indicted by the Grand Jury of Wilkes County, North Carolina, wherein he was charged with the crime of rape, along with Ralph Vernon Litteral, on one Peggy Ruth Shore in Wilkes County, North Carolina.

The petitioner and Ralph Vernon Litteral were tried by a jury in the Superior Court of Wilkes County and convicted of the capital crime of rape by the jury and judgment of death was pronounced on said defendants by the Superior Court Judge holding said court.

Appeal was perfected to the Supreme Court of North Carolina, which is the highest court of said state, and on

June 5, 1947, in an opinion rendered by Justice M. V. Barnhill, the Court affirmed the case and affirmed the judgment of death pronounced against both of said defendants.

Certified copy of the opinion of the Supreme Court of North Carolina is attached hereto, made a part of this petition and is marked Exhibit "A". We are also attaching to this petition a copy of the brief and argument in support thereof filed on behalf of this petitioner in the Supreme Court of North Carolina, making said Exhibit "B".

Your petitioner is filing this petition in this Honorable Court asking for a review of this case to the end that his rights may be properly protected and adjudicated as provided for by the law of the land.

Jurisdictional Statement

Petitioner contends that this Court has jurisdiction by reason of the Fifth Amendment, which is as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation.

The Sixth Amendment, which is as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted

with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the Assistance of Counsel for his defence.*

And the Fourteenth Amendment, Section 1, which is as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws.

And Title 28 U. S. C. A. 344 (b):

> *It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in* which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the *Constitution,* treaties, *or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution,* or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph

be an obstacle to granting a review on certiorari under this paragraph.

18 U. S. C. A. 595: It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him, and no mileage shall be allowed any officer violating the provisions hereof.

The petitioner was convicted by jury on evidence consisting almost solely of a confession which he contends was involuntary and extracted from him under duress. This statement was challenged by him in the trial court, as is shown by record pages 97 through 108, and the Supreme Court of North Carolina, record page 216, Assignment of Error 29.

The defendant contends that his rights under the Fifth, Sixth and Fourteenth Amendments were violated, and he is now deprived of his liberty, and will be deprived of his life, without due process of law; that the statement obtained from him was secured in violation of Title 18, Section 595, U. S. C. A., and the Constitution, in that they did not advise him that he was entitled to counsel, did not carry him before a United States Commissioner, as the law required, arrested him in such a manner as to put him in great fear of his life, and succeeded in extorting from him the confession which resulted in his conviction of the capital crime of rape; all done in violation of the Fifth, Sixth and Fourteenth Amendments.

The judgment of the Supreme Court of North Carolina, which is the highest court in that State, was handed down on the fifth day of June, 1947, and application for writ of Certiorari is made this the 2nd day of July, 1947.

Statement of the Case

The prosecuting witness, Peggy Ruth Shore, contended that she was seized on the night of August 23, 1946, by two men on the public highway near her home in Wilkes County, North Carolina, and that these two men kept her in an automobile the remainder of the night, taking her to various places, and that the two men committed the act of rape on her on two or three occasions.

The petitioner Bell was first arrested on a warrant of the United States Government which charged him with the kidnapping of Peggy Ruth Shore. The Petitioner Bell was arrested by United States officers at his home around 12:00 o'clock at night on September 2nd or 3rd, 1946. At the time of his arrest, six or more officers were present at his home all armed. Your petitioner was ordered to come out of his home with his hands up. Your petitioner was taken to Wilkesboro, North Carolina, where his finger prints were taken. He was then taken to the Yadkin County jail at Yadkinville, North Carolina, a distance of thirty miles from Wilkesboro, North Carolina, where he and the officers arrived around three o'clock at night. Your petitioner was then questioned and cross examined by the Federal officers until daylight when and where he is alleged to have made the voluntary confession. He was then left in jail and that afternoon was given a preliminary hearing before a United States Commissioner in Yadkinville, North Carolina. Thereafter, on November 6, 1946, an order was signed by Johnson J. Hayes, United States District Judge for the Middle District of North Carolina, releasing your

petitioner and the defendant Litteral to the State Court of North Carolina for trial on the charge of rape.

A true bill charging this petitioner and Ralph Vernon Litteral with the crime of rape was returned by a Grand Jury in Wilkes County, North Carolina, on the 11th day of December, 1946. At that time and prior thereto there were no names of women at all in the Grand Jury Box of Wilkes County.

The testimony of the prosecuting witness, Peggy Ruth Shore, is set out in detail in the record filed in the Supreme Court of North Carolina, a certified copy of which is filed herewith, and your petitioner refers to the record for the purpose of specifically showing that the prosecuting witness did not at any time identify your petitioner as being one of the two men who placed her in the automobile and raped her.

The State of North Carolina, in order to convict this petitioner, relied almost wholly on the purported confession which was introduced in evidence during the trial in the Superior Court of Wilkes County.

Your petitioner, as shown by the record, is a young man, twenty-three years of age, and lived in Wilkes County, North Carolina, with his wife and children.

Your petitioner stands convicted almost solely and alone upon the alleged confession and admissions said to have been made by him, which said alleged confession and admissions were, as we contend, erroneously allowed to be considered by the jury convicting him.

Specification of Errors

1. THE ALLEGED CONFESSSION, ORAL OR WRITTEN ALLEGED TO HAVE BEEN MADE BY THE DEFENDANT BELL IS ILLEGAL AS EVIDENCE BECAUSE IT WAS NOT FREELY AND VOLUNTARILY SECURED OR GIVEN, AND HIS CONSTITUTIONAL RIGHTS BOTH UNDER THE CONSTITUTION AND STATUTES OF THE STATE OF NORTH CAROLINA AND THE CONSTITUTION OF THE UNITED STATES, PARTICULARLY THE "DUE PROCESS" CLAUSE OF THE 14TH AMENDMENT, ALSO THE 5TH AMENDMENT AND ALSO THE 6TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES WERE OVERRIDDEN AND VIOLATED BY THE CONSTITUTED AUTHORITIES OF THE UNITED STATES AND OF NORTH CAROLINA.

2. THE ALLEGED CONFESSION AND ADMISSIONS, EITHER ORAL OR WRITTEN, PURPORTED TO HAVE BEEN MADE BY DEFENDANT BELL IN THIS CASE, AS SECURED AND EXTORTED IN THIS CASE BY THE MEANS USED, ARE ILLEGAL FOR ALL PURPOSES AND ARE INADMISSIBLE AS EVIDENCE AGAINST HIM.

3. THAT THE GRAND JURY, WHICH RETURNED THE BILL OF INDICTMENT AGAINST YOUR PETITIONER AND THE DEFENDANT LITTERAL, WAS ILLEGALLY CONSTITUTED.

Supporting Authorities:

General Statutes of North Carolina, Section 15-47;
Constitution of North Carolina, Article 1, Section 11;
Constitution of the United States, Amendment 5;
Constitution of the United States, Amendment 6;
Constitution of the United States, Amendment 14;
Ashcraft, et al. v. *State of Tennessee,* 322 U. S. 143;
Ashcraft, et al. v. *State of Tennessee,* 327 U. S. 274;
Brahm v. *United States,* 42 L. Ed. 568, 169 U. S. 532;
Ziang Sung Wan v. *United States,* 266 U. S. 1, 69 L. Ed. 131;
Chambers v. *Florida,* 309 U. S. 227, 84 L. Ed. 419;
White v. *State of Texas,* 310 U. S. 530;
Lomax v. *State of Texas,* 313 U. S. 544;
Vernon v. *State of Alabama,* 313 U. S. 547;

Canty v. *Alabama*, 309 U. S. 628;
Benjamin McNabb, et al. v. *United States*, 87 U. S. L. Ed. 579;
Mitchell Clifton Anderson v. *United States*, 87 U. S. L. Ed. 589;
State v. *Smith*, 213 N. C. 299;
State v. *Whitener*, 191 N. C. 659;
State v. *Dick*, 60 N. C. 440;
State v. *Andrews*, 61 N. C. 205;
Ballard, et al., v. *United States*, 329 U. S. Reports 187, 91 U. S. L. Ed. 195;
28 U. S. C. 344b;
18 U. S. C. 595;
18 U. S. C. A. 595;
5 U. S. C. A. 300(a);
5 U. S. C. 300(a);
Smith v. *State of Texas*, 311 U. S. 128.

Argument

We submit that the record in this case plainly and obviously shows that any statement or alleged confession as made by Marvin Claude Bell testified to by the witness John G. Johnson was made under duress and under circumstances that clearly show it was not freely and voluntarily made and that the act of the witness Johnson, and various other Federal and State officers, in the treatment of the petitioner was in violation of his rights under the Constitution and Statutes of North Carolina, and also the Constitution of the United States as aforesaid.

The defendant, Marvin Claude Bell, was arrested about midnight on the 2nd of September, 1946, by the officers of the Federal Bureau of Investigation, four in number, together with two State Highway Patrolmen, a total of at least six officers, at his home in the rural section of Wilkes

County. He was told to come out with his hands up, and he did so. Five of the officers waited with pistols in their hands, the other with the warrant and with a pistol in his pocket (R. pp. 98, 99 and 100). They carried the defendant back in his home and searched his home, and demanded his purse from his wife, who was in bed with their two small children, while holding the defendant under guard covered with a pistol. He was carried to Wilkesboro by this armed group and was fingerprinted (R. pp. 98 through 107). Although the record does not disclose it, there was a United States Commissioner for the Wilkesboro Division living about three miles from North Wilkesboro. The defendant, after being fingerprinted, was carried by this same group, possibly joined by others, to the admission room of the jail in Yadkin County. He was questioned there by these Federal officers concerning his participation in the alleged crime of kidnapping until about daylight. Three of these highly trained officers were present most of the time, and two of them all the time. The record also discloses that there was a United States Commissioner residing in Yadkinville, N. C., which is some thirty miles from Wilkesboro, where the defendant was fingerprinted. This United States Commissioner lives in the little town of Yadkinville, N. C.

In the process of interrogating the defendant with reference to the crime of kidnapping, a statement was obtained from him, which statement counsel for the defendant challenged at the trial as being obtained under duress. The number of the officers present at the time of the arrest armed as they were, the fact that he was carried from place to place in automobiles and ever present with him were the armed men, whom he knew to be armed, and others passing in and out of the jail room where he was, induced the defendant through fear of his life to confess to the crime of kidnapping.

It appears in the record (R. p. 93) that the co-defendant, Ralph Vernon Litteral, had previously made a statement and it is contended, although it is not in evidence, that the skilled investigators, as they were, represented to this mountain boy that his co-defendant had already confessed to the crime of kidnapping and was placing the blame on this defendant, and as a result of their cunning examination, induced this defendant to give the statement, which was later used against him for the crime of rape for which the defendant was later indicted.

The petitioner further contends that had the facts not been true as above contended that the agents of the Federal Bureau of Investigation would have carried the defendant before the United States Commissioner stationed at Wilkesboro, North Carolina, within three miles of the place where the fingerprinting took place, and advised him of his rights as provided for in the statutes, United States Code Annotated, Title 18, Section 595, but instead, in their scheme to secure a confession from the defendant, the officers waited until the confession was obtained, denying the defendant the opportunity to confer with counsel and to have the United States Commissioner advise him that he was entitled to counsel. They whisked him away to Yadkinville, some thirty miles distant, and there instead of carrying him immediately before a Commissioner, proceeded to question him with reference to the crime of kidnapping when the agents knew he was entitled to be carried before a United States Commissioner and be advised that he was entitled to confer with counsel and friends before making any statement; and after the statement had been obtained he was committed to jail until about 5:00 o'clock the next afternoon when they saw fit to carry him before United States Commissioner Mackie in Yadkinville.

The petitioner contends that without the statement intro-

duced in evidence that no conviction could ever have been had against this defendant; that at no time in the entire record does it appear that this defendant was identified by the prosecuting witness, and at no time was he ever identified as being with the co-defendant Litteral after approximately 10:30 o'clock on the night of the alleged commission of the crime (R. p. 80), and were it not for his confession the State would not have had sufficient evidence to have carried the case to the jury.

The petitioner further contends that the alleged crime was committed on the 23rd day of August, 1946, and his having been arrested on a Federal charge and his confession having been obtained in violation of the Federal Law, and having been retained in the custody of the Federal authorities until the 6th day of November, 1946, the fact that the confession was obtained before he was permitted to confer with friends and counsel and before he was carried before a United States Commissioner and advised of that fact and the way and method in which the confession was obtained and the persons by whom it was obtained, renders the statement involuntary and that its use against him violates his rights as a citizen of the United States as guaranteed to him under the Fifth Amendment, Sixth Amendment and 14th Amendment of the Constitution of the United States. That his rights have been violated in that the confession being inadmissible in the Federal Court for the crime which he was charged with at the time of the alleged confession that to transfer the confession and his case to the State Courts for trial on another charge deprived him of the due process clause, required him to give evidence against himself, and also deprived him of his Constitutional right of counsel.

The defendant further contends that the statement having been obtained by Federal authorities, while he was

under arrest on a Federal charge, the Federal Court was without authority to transfer his custody to the State Court and to permit the State Court to use a confession against him which was inadmissible in the courts of the United States.

The State Court has consistently held that the court is the judge of the voluntariness of the confession and that he must so find before he admits it in evidence. In the instant case the trial judge, upon objections to the testimony, ordered the jury to retire and the witness was questioned on the *voir dire* as to the circumstances under which the confession was obtained. At the conclusion of the examination the trial court, without announcing any finding of fact, ordered the jury in the box stating, "objection overruled" (R. p. 107).

An examination of the record will reveal that the witness Johnson, an experienced agent of the Federal Bureau of Investigation, when being questioned on the *voir dire* was not only reluctant to answer the questions propounded, but was extremely evasive in his answers (R. pp. 98 through 108).

The record discloses that the alleged crime was committed on the 23rd day of August, 1946. The petitioner Bell was observed by an enforcement officer in North Wilkesboro, Wilkes County on August 24, 1946, and insofar as the record discloses he remained at his home in Wilkes County, a distance of about six miles from North Wilkesboro, until the 2nd day of September, 1946. That the officers did not visit his home insofar as the record discloses or make any effort to apprehend him until about midnight of September 2, 1946, when they went in a body of at least six officers, all armed with pistols, to his home and told him to come out with his hands up. Although this was a Federal process, the arresting officers did *not* take him before the nearest

United States Commissioner or the nearest judicial officer, but to the contrary *carried him in the late hours of the night beyond Wilkesboro, a distance of thirty miles, to Yadkinville and did not take him before any commissioner or other judicial officer until the following afternoon* and after the alleged confession had been obtained.

18 U. S. C. 595;
18 U. S. C. A. 595;
U. S. C. 300 a 5;
5 U. S. C. A. 300 a;
McNabb v. *United States,* 318 U. S. 332.

The Supreme Court of North Carolina in its decision says that the trial court must have found the statement voluntary else he would not have overruled the objections, and in the opinion of the Supreme Court Decision, Justice Barnhill writing, says: "We find no prejudicial error." It may be presumed that the trial court and the Supreme Court of North Carolina felt that there was no doubt of the defendant's guilt of the capital crime charged. However, that is not the test. The founders of our country, the law making body who formed our Constitution, did not decide the guilt or innocence of the accused, but guaranteed to him the fundamental principals of liberty. Until his guilt is established beyond a reasonable doubt and found guilty that no person shall be required to give testimony against himself. This is a right that is guaranteed by all the people of the United States. The law making it a capital offense to commit the crime of rape is the one that is adopted by the law makers of the State of North Carolina and the defendant is not required to forfeit his life until he has had given to him those rights and securities which all men are entitled to under the Constitution of the United States, and whether he be guilty of the crime of rape or not guilty is not the question in this case, but has he had the

equal protection of the law as guaranteed to him under the Constitution.

We again respectfully call the attention of this Honorable Court to the fact that the trial Judge in the Superior Court of Wilkes County, North Carolina, did not make any finding at all as to whether the alleged confession and admissions of the defendant Bell were voluntary or not (R. pp. 98 through 108). Nor did the Supreme Court of North Carolina make any such finding. In addition to this the Trial Court referred to the alleged confession and admissions and in that connection charged the jury as follows: "He (referring to Bell) contends in view of the nature of the testimony that has been offered, the manner in which it has been produced, the manner in which it was secured, the testimony that has been offered by the State with respect to his and Litteral's association, etc." (R. p. 203).

Counsel for the petitioner respectfully submits that the facts of this case are very similar to the facts and circumstances in the case of *Ashcraft, et al.* v. *State of Tennessee,* 322 U. S. 143, in which this Honorable Court held that the State of Tennessee and the lower court were in error in admitting confessions and admissions. In addition to the authorities of the two *Ashcraft* cases, we respectfully call to the attention of this Honorable Court that the defendant Bell was in the hands of United States officers and that any confession and admissions that were obtained were by officers of the United States Government, and the defendants were being held on the charge of kidnapping on a United States warrant, which charge is a capital offense in some instances the same as the crime of rape, under the State law. For some unknown reason the United States Court surrendered the two defendants to the Courts of North Carolina for trial after holding them from the 2nd day of September, 1946 until November 6, 1946. Does it not seem

a reasonable conclusion that the Attorney General of the United States and his associates, after a careful study of this case, decided that any confession or admission made by the defendants in this case would not be legal evidence against them in the United States Courts, and thus in order to get around the rulings of the United States Court, the defendants were voluntarily released to the North Carolina State Court under the assumption that the confessions and admissions might be admissible under the State law. Counsel for the petitioner respectfully submit that if confessions and admissions are involuntary and are not legal evidence under the laws of the United States Government, then the same admissions and confessions obtained by the United States officers should not be admissible under the same facts and circumstances in the State Court.

Certainly, we respectfully submit that under the holdings of this Court the confessions and admissions allowed as evidence in this case were illegal and inadmissible under the facts and circumstances, as shown by the record.

Benjamin McNabb, et al. v. *United States,* 87 U. S. L. Ed. 579;

White v. *State of Texas,* 310 U. S. 530.

We do not think it necessary to quote from the above cited cases, but we do wish to at least call the Court's attention to a portion of the opinion in the *Ashcraft* case, which seems to be at least one of the latest opinions on the subject of confessions. In this case this Honorable Court says: "We think a situation such as that here shown by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear. It is inconceivable that any Court of justice in the land, conducted as our Courts are, open to the public, would permit prosecutors serving in relays to keep a defend-

ant witness under continuous cross examination for thirty-six hours without rest of sleep in an effort to extract a "voluntary" confession. Nor can we, consistently with Constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open court room."

We respectfully call to the attention of this Honorable Court the following provision of the Constitution of North Carolina, Article 1, Section 11: "In all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defense, *and not be compelled to give evidence against himself,* or to pay costs, jail fees or necessary witness fees of the defense, unless found guilty."

And also to Section 15-46, Vol. 1.—General Statutes of North Carolina, which provides: "Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law."

We deem it unnecessary to quote the Amendments of the Constitution of the United States relied on in this case, and which your petitioner contends were violated, but we do wish to call the Court's attention to the United States Statute contained in Section 595, Title 18 of the United States Code Annotated, which provides as follows: "It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States Commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or tak-

ing bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him, and no mileage shall be allowed any officer violating the provisions hereof."

Thus, counsel for the petitioner Bell respectfully submit that the Federal officers, in obtaining and wringing the alleged confession and admissions from the defendant Bell, not only violated the Constitutional provisions and the Statute of North Carolina, but also the Constitutional provisions and Statutes of the United States, and we again respectfully call the Court's attention to the fact that the officers obtaining the alleged confession were officers of the Federal Bureau of Investigation and that the petitioner Bell was being detained and held on a United States charge.

Specification of Error No. 3

THAT THE GRAND JURY, WHICH RETURNED THE BILL OF INDICTMENT AGAINST YOUR PETITIONER AND THE DEFENDANT LITTERAL WAS ILLEGALLY CONSTITUTED.

It is submitted that under the laws of North Carolina women were eligible to serve on juries at the time the bill of indictment was returned in the Superior Court of Wilkes County on December 11, 1946. It was admitted by counsel for the prosecution and for the defendant Bell (Addenda to Record) that there were no women's names in the Grand Jury Box, or on the scroll, at the time the bill was found. Under amendment to the Constitution of North Carolina, voted by the people of North Carolina in 1946, women were to be eligible for jury service, and under the act of the General Assembly of North Carolina this law became effective on December 10, 1946, and prior to the time the bill was returned in open court as a true bill.

A motion was filed requesting the trial court to quash the bill of indictment for the reason that women were not represented on the Grand Jury panel, and that no women's names were in the Grand Jury Box at the time of the organization of the Grand Jury (R. p. 5 through 9).

This motion was denied by the trial court and on the exception taken to the Supreme Court on this point Justice Barnhill, writing the opinion, states that the said exception is without merit, setting forth, "Before it becomes of practical application it needs must be implemented by legislation prescribing qualifications and manner of selection of women for jury service" (Opinion of Supreme Court of North Carolina).

We submit that this is clearly in contradiction of the proceedings of the trial court for the reason that the trial court of the Superior Court ordered a special venire directed to the High Sheriff of Caldwell County, in which he commanded the officer to summons persons to serve as jurors in the trial of the case, of men or women, and that the panel summoned constituted men and women, Caldwell County being under the laws of the State of North Carolina (R. p. 15).

Thus the petitioner contends that the opinion of the State Supreme Court is erroneous, or if not, then the trial court was in error in ordering both men and women to serve on the petit jury.

Ballard v. *United States,* 329 U. S. 187.

Your petitioner further contends that the systematic exclusion of a group of persons from jury service violates the constitutional guarantee of "equal protection of the laws" as provided by the Fourteenth Amendment.

Smith v. *State of Texas,* 311 U. S. 128.

Although the above cited case deals with the exclusion of the negro race from service on the jury, your petitioner

respectfully submits that the same theory is applicable to service wherein any group of persons is excluded by reasons of race, color, creed, politics or sex.

Your petitioner therefore respectfully prays that this his petition for writ of certiorari be issued and granted to the Supreme Court of the State of North Carolina to bring this cause before this Honorable Court and the record in this cause so that this Honorable Court might consider the issues raised in said petition and errors assigned, and that upon consideration by this Honorable Court his case be reversed and his constitutional rights preserved.

This is the first application for writ of certiorari in this case.

Respectfully submitted,

RAYMOND KYLE HAYES,
CLYDE HAYES,
EUGENE TRIVETTE,
J. E. HOLSHOUSER,
W. G. MITCHELL,
Attorneys for Petitioner.

Marvin Claude Bell, being first duly sworn, deposes and says:

That he has heard read the foregoing Petition and that the facts therein stated are true of his own knowledge, except as to such things and matters as are stated on information and belief, and as to those he believes it to be true.

MARVIN CLAUDE BELL.

Sworn and subscribed to before me, this the 30 day of June, 1947.

[SEAL.] R. G. POOLE.

My commission expires March 18, 1948.

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AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 168

MARVIN CLAUDE BELL,

Petitioner,

vs.

THE STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petitioner, Marvin Claude Bell, seeks by writ of *certiorari* to have the United States Supreme Court review the decision of the Supreme Court of North Carolina affirming a judgment of the Superior Court of Wilkes County imposing the death sentence upon the petitioner for committing the crime of rape on Peggy Ruth Shore in contravention of Section 14-21 of the General Statutes of North Carolina. The opinion of the Supreme Court of North Carolina was filed June 5, 1947, and is reported as STATE v. RALPH VERNON LITTERAL and MARVIN CLAUDE BELL, 227 N. C., page 527.

FACTS

The petitioner was indicted for the capital crime of rape under Section 14-21 of the General Statutes of North Carolina which reads as follows:

> "Punishment for rape.—Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawful and carnally knowing and abusing any female child under the age of twelve years, shall suffer death."

The petitioner was first arrested on a warrant of the United States Government charging him with the crime of kidnapping; but thereafter on the 6th day of November, 1946, His Honor Johnson J. Hayes, United States District Judge for the Middle District of North Carolina, by order duly entered, directed the United States Marshal for the Middle District to release the defendants to the Sheriff of Wilkes County, to the end that they might answer the charge against them in the Superior Court of said County, without prejudice to the rights of the United States, to prosecute the defendants in the Middle District Court for the offenses committed against the laws of the United States of America.

Thereafter, at the December term of the Superior Court of Wilkes County the Grand Jury of said County returned a true bill of indictment against each of the defendants, charging them with the crime of rape for which they are prosecuted in this action; and upon conviction, appealed to the Supreme Court of North Carolina where the action of the Superior Court of Wilkes County was affirmed by the North Carolina Supreme Court in an opinion filed June 5, 1947, and reported in 227 N. C. 527. The petitioner, Marvin Claude Bell, now seeks a writ of *certiorari* in this Court.

Most of the evidence in this case is of such a sordid, revolting, and repulsive nature that details will not be set out except to the extent necessary to enable the Court to

obtain a true picture of the commission of the crime of rape upon a young girl, barely sixteen years of age. The prosecutrix testified, among other things, that on the 23rd day of August, 1946, she went to a watermelon feast in the Town of Elkin with several of her young companions and left about 9:30 p.m., but too late to catch the bus back home. She and her companions went to the show and returned to the bus station about 11:00 p.m. and took the bus for home. While riding on the bus, she and her companions noticed a black car with the lights off following, and eventually, passing the bus. Her companions got off the bus at their homes and she continued on to the end of the bus line, about one hundred (100) yards from her home. As she got off the bus, she saw the car which had been following the bus parked between her and her home, and as she neared it, the door opened and one of the two occupants hollered to the other, "grab her." Notwithstanding her attempts to escape, she was overpowered, pulled into the back of the car, and when she screamed and attempted to get loose, one of the defendants threw her to the floor board and sat upon her with his hands over her mouth, gagged and blindfolded her. (R. pp. 27, 28, and 29). The car sped away with the prosecutrix; and after she was criminally assaulted by each of them on several occasions in Wilkes County, they proceeded on a mad race through several of the counties of Western North Carolina and Eastern Tennessee. During this trip, she was several times raped, and on at least one occasion, compelled to submit to the abominable and detestable crime against nature. About daybreak, the prosecutrix was finally released in a corn field near Bristol, Tennessee.

ARGUMENT

The petitioner, on Page 7 of his brief, sets out as his basis for a writ of *certiorari* the following specifications of error:

"1. THE ALLEGED CONFESSION, ORAL OR WRITTEN ALLEGED TO HAVE BEEN MADE BY THE DEFENDANT BELL IS ILLEGAL AS EVIDENCE BECAUSE IT WAS NOT FREELY AND VOLUNTARILY SECURED OR GIVEN, AND HIS CONSTITUTIONAL RIGHTS BOTH UNDER THE CONSTITUTION AND STATUTES OF THE STATE OF NORTH CAROLINA AND THE CONSTITUTION OF THE UNITED STATES, PARTICULARLY THE "DUE PROCESS" CLAUSE OF THE 14TH AMENDMENT, ALSO THE 5TH AMENDMENT AND ALSO THE 6TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES WERE OVERRIDDEN AND VIOLATED BY THE CONSTITUTED AUTHORITIES OF THE UNITED STATES AND OF NORTH CAROLINA.

"2. THE ALLEGED CONFESSION AND ADMISSIONS, EITHER ORAL OR WRITTEN, PURPORTED TO HAVE BEEN MADE BY DEFENDANT BELL IN THIS CASE, AS SECURED AND EXTORTED IN THIS CASE BY THE MEANS USED, ARE ILLEGAL FOR ALL PURPOSES AND ARE INADMISSIBLE AS EVIDENCE AGAINST HIM.

"3. THAT THE GRAND JURY, WHICH RETURNED THE BILL OF INDICTMENT AGAINST YOUR PETITIONER AND THE DEFENDANT LITTERAL, WAS ILLEGALLY CONSTITUTED."

I

THE CONFESSION OF THE PETITIONER WAS NOT SECURED BY THREATS, OFFER OF REWARD OR HOPE OF REWARD OR BY OTHER INDUCEMENTS, OR BY BRUTALITY, TORTURE, OR AN UNREASONABLE EX-

AMINATION TO THE EXTENT THAT THE PETITIONER WAS DEPRIVED OF HIS RIGHTS AS GUARANTEED BY THE "DUE PROCESS" CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The record in this case is void of any evidence tending to show that any threat, reward, or hope of reward, or other inducement was made, nor is there any evidence of brutality, torture, or unreasonably long examination in obtaining the petitioner's confession. The petitioner was examined while "in the sitting room, living room of the jail; it is a reception room." "There are no bars on the doors or windows." Under these circumstances, the petitioner was quizzed from about 3 o'clock in the morning until about daybreak. (R. pp. 100, 101, and 102).

—A—

CONFESSIONS ARE PRESUMED AND ARE TAKEN AS *PRIMA FACIE* VOLUNTARY, AND ADMISSIBLE IN EVIDENCE UNLESS THE CONTRARY IS SHOWN; AND THE BURDEN IS UPON THE PARTY AGAINST WHOM THEY ARE OFFERED TO SO SHOW.

Hartzell v. United States, 72 F. (2d) 569
Gray v. United States, 9 F. (2d) 337
Murphy v. United States, 285 F. 801
Ah Fook Chang v. United States, 91 F. (2d) 805
State v. Murray, 216 N. C. 681; 6 S. E. (2d) 513
State v. Wagstaff, 219 N. C. 15; 12 S. E. (2d) 657
State v. Hudson, 218 N. C. 219; 10 S. E. (2d) 730
State v. Grass, 223 N. C. 31; 25 S. E. (2d) 193
State v. Mays, 225 N. C. 486; 35 S. E. (2d) 494
State v. Wise, 225 N. C. 746; 36 S. E. (2d) 230
State v. Bennett, 226 N. C. 82; 36 S. E. (2d) 708

In HARTZELL v. UNITED STATES, and MURPHY v. UNITED STATES, *supra,* writs of *certiorari* were denied In the lower Federal Court, Counsel for the defendants ob-

jected to the testimony of officers as to confessions made by the defendants after arrest. It was pointed out in the Federal Court opinion that there is no presumption against the voluntary character of a confession, and the burden is not on the Government in the first instance to show its voluntary character, that the admissibility of such evidence depends largely upon the circumstances connected with the statements, and the matter is largely one to be determined by the trial court.

In AH FOOK CHANG, *supra,* it is stated:

"A confession is presumed to be voluntary. Wilson v. United States, 162 U. S. 613, 622, 16 S. Ct. 895, 40 L. Ed. 1090; Murphy v. United States (C. C. A. 7) 285 F. 801, 808. At the trial there was no evidence except that the confessions were voluntarily made, since appellants introduced none. Thus there was no such question for the jury to decide. The instructions were properly refused. Mitchell v. Potomac Insurance Co., 183 U. S. 42, 49, 22 S. Ct. 22, 46 L. Ed. 74; and see Carter v. Carusi, 112 U. S. 478, 484, 5 S. Ct. 281, 28 L. Ed. 820."

In MURPHY v. UNITED STATES, *supra,* it is stated:

"Both Counsel for defendants and the District Court labored under the erroneous impression that there was a presumption against a confession, that it was presumptively inadmissible, and that the Government carried a heavy burden in establishing the voluntary character of such a statement, which burden was not met, if there was any evidence tending to impeach the statement of those who secured the statement. We do not understand such to be the law."

—B—

CONFESSIONS ARE NOT RENDERED *IPSO FACTO* INVOLUNTARY BECAUSE OF THE PRESENCE OF OFFI-

CERS OR THE FACT DEFENDANTS WERE UNDER ARREST OR IN JAIL AT THE TIME.

United States v. Mitchell, 322 U. S. 65-71; 88 L. Ed. 1140
George Pierce v. United States, 160 U.S. 355; 40 L.Ed. 454
Thomas Bram v. United States, 168 U.S. 532; 42 L.Ed. 568
Benjamin McNabb v. United States, 318 U. S. 332; 87 L. Ed. 819
State v. Richardson, 216 N. C. 304; 4 S. E. (2d) 852
State v. Thompson, 224 N. C. 661; 32 S. E. (2d) 24
State v. Smith, 213 N. C. 299; 195 S. E. 819
State v. Exum, 213 N. C. 16; 195 S. E. 7
State v. Caldwell, 212 N. C. 484; 193 S. E. 716
State v. Rodman, 188 N. C. 720; 125 S. E. 486
State v. Stefanoff, 206 N. C. 443; 174 S. E. 411

In U. S. v. MITCHELL, *supra,* it is stated:

" 'The mere fact that a confession was made while in the custody of the police does not render it inadmissible.' 318 U.S. at 346, 87 L. Ed 827, 63 S. Ct. 608. Under the circumstances of this case, the trial courts were quite right in admitting, for the juries' judgment, the testimony relating to Mitchell's oral confessions as well as the property recovered as a result of his consent to a search of his home."

—C—

THE CONFESSION IS NOT RENDERED INVOLUNTARY BECAUSE IT WAS OBTAINED BY FEDERAL OFFICERS PRIOR TO COMMITMENT BY U. S. COMMISSIONER.

By order dated November 6, 1946, His Honor, Johnson J. Hayes, U. S. District Judge for the Middle District of North Carolina, in which district the crime of rape was committed by petitioner, directed the U. S. Marshal for said district to release the petitioner to the Sheriff of Wilkes County to the end that he might answer the charge against him in the Superior Court of said County. Subsequently, at the De-

cember term, 1946, the regular constituted Grand Jury of Wilkes County returned a true bill of indictment against the petitioner, charging him with the crime of rape.

The statute which the petitioner claims has been violated is a Federal one involving Federal practice and procedure in the trial of Federal cases in the Federal Court. The case at bar is a State case involving the violation of a State statute; and as to whether or not the confessions were obtained prior to the commitment of the defendant by the Commissioner is not a Federal question which involves the petitioner's constitutional rights under the "Due Process" Clause. In U. S. v. MITCHELL, *supra,* this Court points out the distinction between the applicability of Federal statutes dealing with admission of evidence in criminal trials in the Federal Courts and as to admission of evidence in the State Courts, and said:

> "Review by this Court of state convictions presents a very different situation, confined as it is within very narrow limits. Our sole authority is to ascertain whether that which a state court permitted violated the basic safeguards of the Fourteenth Amendment. Therefore, in cases coming from the state courts in matters of this sort, we are concerned solely with determining whether a confession is the result of torture, physical or psychological, and not the offspring of reasoned choice."

II

THE GRAND JURY RETURNING THE BILL OF INDICTMENT WAS LEGALLY CONSTITUTED EVEN THOUGH IT CONTAINED NO MEMBERS OF THE FEMALE SEX.

Prior to the effective date of the amendment to the North Carolina Constitution permitting women to serve on juries, women were not eligible for jury service. STATE v. EMERY, 224 N. C. 581; 31 S. E. (2d) 858. It is not denied that this constitutional amendment became effective on De-

cember 10, 1946, one day prior to the date the bill of indictment against the defendant was returned. The authority for placing names in the jury box is found in Article 1 of Chapter 9 of the General Statutes of North Carolina, and this section requires that the jury list, the drawing of the original panel, and the placing of names in the jury box must be completed on the first Monday in July of each odd year. General Statutes of North Carolina, 9-2. The first opportunity after the passage of the constitutional amendments affording county commissioners authority to place the names of women in the jury box was the first Monday in July, 1947. There is nothing in this amendment which requires the names of women to be placed in the jury box, it merely places them on the same basis as males.

—A—

THE STATE HAS A RIGHT TO FIX QUALIFICATIONS FOR JURORS WITHOUT VIOLATING THE FOURTEENTH AMENDMENT IF THE STATUTE DOES NOT SPECIFICALLY DISCRIMINATE BECAUSE OF COLOR OR RACE.

Thiel
~~Phield~~ *v. South Pacific Co.*, 328 U.S. 217; 90 L.Ed. 1181
Strauder v. West Virginia, 100 U.S. 303; 25 L.Ed. 664

One quotation from STRAUDER v. WEST VIRGINIA, *supra*, we think will be sufficient on this question:

> *"We do not say that, within the limits from which it is not excluded by the Amendment, a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications.* We do not believe the 14th Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or

color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it." (Italics ours.)

In THIEL ~~PHIELD~~ v. SOUTH PACIFIC CO., *supra*, dealing with the exclusion of "daily wage earners" from a Federal jury list, the Supreme Court of the United States ordered the jury panels stricken out in the exercise of its power of supervision over the admission of justice in the Federal courts, the Court saying:

"It follows that we cannot sanction the method by which the jury panel was formed in this case. The trial court, should have granted petitioner's motion to strike the panel. That conclusion requires us to reverse the judgment below *in the exercise of our power of supervision over the administration of justice in the Federal courts.* See McNabb v. United States, 318 U.S. 332, 340, 87 L.Ed. 819, 823, 63 S. Ct. 608." (Italics ours.)

—B—

THE PETITIONER BEING A MALE CANNOT COMPLAIN BECAUSE THE JURY, AS CONSTITUTED, DID NOT CONTAIN MEMBERS OF THE FEMALE SEX.

It is generally held, by the courts of the State of North Carolina and by the United States Supreme Court, that a person not belonging to the group or race discriminated against cannot raise a question of discrimination in the selection of a jury. A defendant must bring himself within the class discriminated against.

State v. Sims, 213 N.C. 590, 592; 197 S.E. 176, 177
Rawlins v. Georgia, 201 U.S. 638; 50 L.Ed. 899
Commonwealth v. Garletts, 81 Pa. Super. Ct., 271
McKinney v. State, 30 P. 293 (Wyo.)
State v. James, 114 A. 553 (N.J.)

Griffin v. State, 190 S.E. 2 (Ga.)
State v. Walters, 102 P. 2d. 284, 286 (Idaho)
Commonwealth v. Wright, 79 Ky. 22, 24
U. S. v. Chaplin, 54 Fed, Supp. 682

It is also generally held that officers in charge of the selection and summonsing of the jury panel are presumed to have performed their duty fairly and justly without discrimination against race or class and that the burden of proof is on the defendant to show an alleged discrimination.

Murray v. Louisiana, 163 U.S. 101; 41 L.Ed. 87
Tarrance v. Florida, 188 U.S. 519; 47 L.Ed. 572; 116 So. 470 (Fla.); (certiorari denied in 278 U.S. 599; 73 L.Ed. 525)
Aiken v. Texas, 325 U.S. 398; 89 L.Ed. 1692

CONCLUSION

Even if some of the questions set out in the petition are Federal ones, they are not substantial and have been resolved adversely to the contentions of the petitioner and are not of sufficient importance to warrant consideration by the United States Supreme Court. The writ should be denied since, under the rules and decisions of this Court, review on writs of *certiorari* is a matter not of right but of discretion.

Utley v. St. Petersburg, 292 U.S. 106
Leonard v. Vicksburg S. & P. R. Co., 198 U.S. 416

Respectfully submitted,

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